Collins, J., & Ashworth, A. (2016). Householders, Self-Defence and the Right to Life. *Law Quarterly Review*, *132*, 377-382.

Householders, Self-Defence and the Right to Life

In what circumstances can a private householder claim that he did not commit a crime, in using violence, because he was warding off a threat from an intruder? It is rare for national courts in England and Wales to consider this controversial question in the light of the state's obligation to protect the right to life (Article 2 of the European Convention of Human Rights). For this reason, the Divisional Court's decision in *R (Collins) v Secretary of State for Justice* [2016] EWHC 33 (Admin) merits attention.

On 15 December 2013, Mr Collins unlawfully entered the home of B. He was discovered upstairs by the householder's son, D, and chased downstairs toward the householder, B, who was asleep at the time. Mr Collins was restrained into a headlock by B. B was a 51-year old man, intoxicated, and weighing 15 ½ stones. It was alleged that the headlock lasted six minutes in total, which rendered Mr Collins comatose (a state in which he remains). Recordings of calls made to the emergency services revealed that B threatened to kill Mr Collins in a series of "highly emotional outbursts" (at [5]). Evidence given by witnesses in the house was that Mr Collins was "very strong", "putting up a good fight", struggling "like mad", was "going crazy", and was "really fired up" (at [8]). It was also claimed that in an incident in April 2013, Mr Collins had been "very violent" to four police officers, and was "extremely strong" (at [8]).

A decision was made not to prosecute B on the basis that the use of force in this case was not so disproportionate as to tip into the range of "grossly disproportionate", within the terms of s. 76(5A) of the Criminal Justice and Immigration Act 2008. Mr Collins' family sought a declaration that s. 76(5(A) is incompatible with the right to life set out in Article 2 ECHR.

The court's construction of the common law doctrine of self-defence was key to its decision on Article 2 ECHR compatibility. The common law position is that an individual who uses force in self-defence may be held to have acted justifiably if two elements can be proven. First, the defendant must have genuinely believed that force was necessary to defend himself. Second, the nature and degree of that force must have been reasonable in the circumstances, judged on the facts as he believed them to be (Criminal Justice and Immigration Act 2008, s. 76(3)). This second limb was "clarified" by s. 76(5A) of the 2008 Act, which states that:

"In a householder case, the degree of force used by D is not to be regarded as having been reasonable in the circumstances as D believed them to be if it was grossly disproportionate in those circumstances."

In order to use this defence, a householder must have used force in a dwelling, or part of a dwelling, in which he was not trespassing. He must also have believed V to be in, or entering, the building as a trespasser (s. 78(8A-d)).

The passage of the "grossly disproportionate" clarification to the 2008 Act was turbulent in both the House of Commons and the House of Lords. Those in support

emphasized the terror of being confronted by an intruder in one's home and the need for greater legal protection for householders. Lord McNally argued that "the law should be on the side of the householder" who should be given "the benefit of any doubt" (H.L. Deb. 10 December 2012 c. 880-881). In the House of Commons, Damian Green MP put to one side concerns that this would provide *carte blanche* to householders to use disproportionate force. On his approach, s. 76(5A) "is certainly not a licence to commit any act of violence whatever the circumstances", but a means of giving "greater legal protection" to those who "cannot be expected to weigh up exactly how much force is required" in the circumstances (H.C. Deb. 5 February 2013 c. 283).

The question at issue concerned the second limb of the common law rules on self-defence. In principle, could a jury decide that a householder's *disproportionate* use of force was nevertheless reasonable? The Divisional Court held that it could on the grounds that s. 76(5A) did not alter the common law position:

"The standard remains that which is reasonable: the other provisions (and, in particular, s. 76(5A) and (6) of the 2008 Act) provide the context in which the question of what is reasonable must be approached" (at [18]).

In other words, the use of disproportionate (not grossly disproportionate) force is simply a factor which juries may take into account in determining whether an individual's use of force was reasonable. Likewise, whether D could have retreated is another factor to be taken into account in assessing reasonableness in the circumstances. Sir Brian Leveson P. reasoned that this is "to allow for a discretionary area of judgment in householder cases" (at [23]). Thus, the Crown Prosecution Service's (C.P.S.) decision not to prosecute in *R (Collins)* was based on faulty reasoning (though a challenge to this decision had been dropped (at [23])). The C.P.S. had considered "that B would be acquitted of any offence of violence unless the prosecution proved that the degree of forced used was grossly disproportionate, the use of only disproportionate force being lawful" (at [22]). According to the Divisional Court, the degree of force used by a householder may be held disproportionate and yet the use of force may be regarded by the jury as reasonable or not, depending on other factors in the case. And this is why Sir Brian Leveson P. and Cranston J. held that s. 76(5A) is not incompatible with Article 2 ECHR. In cases where householders use force to ward off a threat from an intruder, the common law position prior to the enactment of s. 76(5A) remains; juries must still determine whether a householder's action was reasonable in the circumstances (at [18] and [63]).

The first notable feature of the court's reasoning is its reliance on "reasonableness". Although this is required by the statute itself, there are no easy answers as to what constitutes permissible force by householders in the face of a threat by an intruder. That is precisely why principles must guide juries decision-making in this context. The common law position is that consideration must be given to the role of necessity and proportionality in assessing the overall reasonableness of a defendant's actions, weighed against the right to life. A requirement of necessity, identified in Coke's, *Institutes of the Laws of England* (vol. 3, 55) and Hale's, *The History of the Pleas of the Crown* (vol. 1, 479), means that self-defence is available only where an individual is unable to protect themselves using non-violent means. A "duty to retreat", with

exceptions, is linked to this necessity requirement (for discussion, see A. Ashworth, "Self-Defence and the Right to Life" 34(2) (1975) Camb. L.J. 282, 284-85; J. Beale, "Retreat from a Murderous Assault" (1903) 16 Harvard Law Review 567). English law also accepts that there must be a second limitation to self-defence, embedded in the common law through a requirement of proportionality (for example, *Mancini v DPP* [1942] A.C. 1, at 6-7; *Palmer v R* [1971] A.C. 814, at 831). As the Royal Commission of 1879 noted, without a proportionality standard, there is an open invitation for an individual to argue, for example, that they are justified in shooting an attacker who threatens to pull their hair (*Report of the Royal Commission on the Law Relating to Indictable Offences* (1879, c. 2345) note B, 44). The difficulty is that s. 76(5A) places too heavy a burden upon 'reasonableness' in householder cases where the force used is not grossly disproportionate. In these cases all that is left to be considered is whether the householder's disproportionate response was nevertheless reasonable. Therefore in R *(Collins),* the Divisional Court's line of reasoning relates not to the necessity or proportionality of the force used by a householder, but, so long as it is not grossly disproportionate, to an assessment of the reasonableness of it. Arguably the Divisional Court ought nevertheless to have considered more closely proportionality, given that this is the common law approach. To subsume the proportionality issue (limb two of the common law rules) in these cases into a general reasonableness enquiry is hardly to advance clarity on core principles.

This plays into a second point that more ought to have been said about this overall reasonableness enquiry as it relates to householders. What does it mean that force used may be disproportionate but nevertheless considered reasonable in householder cases? Section 76(7) of the Criminal Justice and Immigration Act 2008 makes clear that in determining reasonableness, the court should take into account that:

"(i) [A] person acting for a legitimate purpose may not be able to weigh to a nicety the exact measure of any necessary action; and (ii) that evidence of a person's having done only what the person honestly and instinctively thought was necessary for a legitimate purpose constitutes strong evidence that only reasonable action was taken by that person for that purpose."

But also of key importance to an assessment of necessity is the idea of a duty to retreat. Historically the common law did not require a duty to retreat in householder cases. That position was justified in terms of a householder's right to protection in his "castle", which ruled out a duty to retreat (see J. Beale, "Retreat from a Murderous Assault" (1903) 16 Harvard Law Review 567, 574-75; 1 Hale P.C. 486; *R v Hussey* (1924) 18 Crim. App. R. 160, 161). Nowadays juries must assess in householder and non-householder cases alike whether a defendant could have retreated in the circumstances (s. 76(6A). Some refinement to this position appears to have been presented in the court's judgment. In the words of Sir Brian Leveson P., while a duty to retreat remains a factor to be taken into account in householder and non-householder cases alike:

"In a householder case, the failure [to retreat] and, thus, the use of force, may be disproportionate but still reasonable although in a non-householder case, that would be unreasonable by virtue of s. 76(6). In that regard, it is important to note that

Article 8 of the ECHR specifically provides for protection of the home and s. 76(5A) may do little more than provide emphasis to this requirement" (at [23]).

It seems that a duty to retreat may be less powerful in householder cases because "Article 8 of the ECHR specifically provides for protection of the home" (at [23]). But if Article 8 ECHR points in this direction, does it get us so far as to say that there is no duty to retreat in householder cases (thus supporting the old common law rule)? Or is it still only a relevant consideration? The Divisional Court does not tease out the complexity of the decision-making here. While a failure to retreat may be a less complex consideration in householder cases given the existence of Article 8 ECHR (and a householder's reduced ability to escape, terror, and/or heightened vulnerability, etc.), this context also raises most acutely an intruder's right to life, expressly protected by Article 2 ECHR. The right to life extends no less to those who unlawfully enter another's home than to those who use force in response to a threat of violence. The need to balance competing rights must feed into an assessment of whether disproportionate force will be reasonable. For example, there ought to have been direct reference to the fact that the level of the threat of unlawful violence by an intruder must be taken into account in weighing up the right to life of both a defender and an attacker.

Third, in the latter part of his judgment Sir Brian Leveson P. considers the compatibility of s. 76(5A) with the European Convention on Human Rights. Of concern are the subjective elements of the first (wholly subjective) and second (partly subjective) parts of the common law test for self-defence (at [13]). The President is right to emphasize that none of the Strasbourg judgments so far has dealt with a householder case, and indeed almost all judgments concern the actions of police or other state officers rather than private individuals (at [62]). However, two important points must not be overlooked. First, Article 2 of the Convention sets out to protect the right to life of every individual: this means that the law should provide protection for the householder's life and for the intruder's life. This should be the starting-point of analysis. Secondly, and connectedly, the Strasbourg Court has been inconsistent in its explanation of what Article 2 requires in cases of genuine but mistaken belief as to the necessity for force. In *McCann v. United Kingdom* (1996) 21 E.H.R.R. 97, at para 200, the Grand Chamber stated that the officers in that case should be judged on the facts that they honestly believed, for good reason, to exist. This is an objective test of reasonable mistake. This wording has been repeated in later judgments such as *Gul v. Turkey* (2002) 34 E.H.R.R. 28, at para. 78, *Bubbins v United Kingdom* (2005) 41 E.H.R.R. 458, at para. 138, and *Giuliani and Gaggio v. Italy* (2011) 52 EHRR 3, at para. 178. However, confusion is spread by the fact that in two of these judgments the Court appears to have gone on to apply a wholly subjective test of honest belief (*Bubbins* at para. 140 and *Giuliani and Gaggio* at paras 179 and 189). English law as stated in s. 76 of the 2008 Act is compatible with Article 2 if the wholly subjective test is the correct one, but incompatible if the "for good reason" requirement is correct. This confusion in the Strasbourg jurisprudence finds no place in Sir Brian Leveson's P. extensive human rights discussion (at [36]-[64]). And, quite unexpectedly, at para. [63] of his judgment, it is roundly stated that:

"the ECtHR has consistently held that the reasonableness of self-defence (in the circumstances as the defendant believed them to be) as applied in state actor cases is compatible with the Article 2(2) requirement of 'absolute necessity'."

Doubts about the compatibility of the English statutory provisions with Article 2 ECHR exercised the Joint Committee on Human Rights when the 2008 Act was at Bill stage (15th Report, session 2007-08, *Legislative Scrutiny*, para. 2.35), but the substance of the Committee's arguments finds no recognition in this judgment (at [65]-69]; [74]).

A fourth point concerns the court's direction for juries on the meaning of "grossly disproportionate" force in s. 76(5A)—'A degree of force that went completely over the top *prima facie* would be grossly disproportionate' (at [33]). A direction on "grossly disproportionate" which starts here is ultimately unconvincing. Grossly disproportionate force *is* first and foremost force which is out of all proportion to the harm with which a householder is threatened, and, as such, removes the application of the doctrine of self-defence. Thus to suggest that such force is only *prima facie* grossly disproportionate appears to raise the possibility that force could be "over the top" and still reasonable. It would surely be much clearer to keep to the wording of the statute and to direct juries using the words "grossly disproportionate". Given the Divisional Court's construction of self-defence in English law, and the uncertainty in the Strasbourg jurisprudence, there are grounds for a different view to be taken on appeal.

Jennifer Collins
University of Bristol.

Andrew Ashworth,
All Souls College, Oxford.